

U.S. Department of Labor

Office of Administrative Law Judges
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DATE: August 10, 2000

CASE NO: 1999-INA-311

In the Matter of

SYSTEMS PLUS TECHNOLOGY, INC.
Employer

on behalf of

SOMETHEA PHANG
Alien

Appearances: H. Neil Garson, Esq.
For Employer

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from System's Plus Technology, Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 30, 1998, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the Maryland Department of Labor, Licensing and Regulation ("DLLR") on behalf of the Alien, Somethea Phang. (AF 50-51). The job opportunity was listed as "Network Analyst," and the job duties were listed as follows:

Maintains and improves data communications network systems using basic computer programming skills and knowledge of network design, software and administration.

(AF 50). The stated job requirements for the position, as set forth on the application, are a B.S. in "Elect. Eng., Commun. Eng. or direct related." No experience was required in the job offered. (Id.). The rate of pay was listed as \$36,000 per year. (Id.).

On August 5, 1998, Employer submitted a letter to the DLLR requesting that the 1997 Human Resource Association of the National Capital Area ("HRA-NCA") for Network Analyst Level I be used or considered for the determination of prevailing wage for this position. (AF 48-49). On February 12, 1999, the DLLR notified the Employer that the HRA-NCA 1998 is applicable for use in this case and that the position offered is classified as a "Level II Network Analyst" with the prevailing wage of \$46,800 per year. (AF 44-47). On March 25, 1999, the Employer responded to the DLLR's notice and asserted that it reexamined the nature and extent of duties and responsibilities that is involved in this position and concluded that the position is in every respect an entry level position. Employer stressed that the worker in this position "does not initiate any actions on his own, and is only responsible for maintaining and troubleshooting our systems under direct supervision and close monitoring. The skills used in this work are

very basic, and are those that are generally acquired in most related undergraduate programs.” (AF 43). In addition, the Employer found that the job description may have failed to illustrate the true entry level nature of this position, and therefore Employer amended the description in the ETA 750A Item 13 to include the statement: “working under the direct supervision of admin. and programming staff.” (AF 43, 50). Employer asserted that Network Analyst I more accurately describes the level of responsibilities involved. (AF 43).

The application was forwarded to the CO on April 8, 1999. (AF 40). On April 15, 1999, the CO issued a Notice of Findings (“NOF”) proposing to deny the application for failure to offer the prevailing wage in violation of Sections 656.20(c)(2), 656.20(g) and 656.21(g)(4). (AF 38-39). The CO found that the wage offer of \$36,000 per year is below the prevailing wage of \$69,284.80 per year. The prevailing rate of pay was determined by the OES Level 2. The CO explained that Level 2 was assigned to this job opportunity based on the job duties described in Item 13, ETA Form 750A as initially submitted to the local office and the information contained in Item 15(a), ETA Form 750B. The CO found that “[t]he alien has been performing the job duties since 1997 and cannot be considered an entry level employee.” (AF 39). The Employer was instructed to rebut this finding by either increasing the salary offer to equal or exceed the prevailing rate of pay and readvertising the job opportunity or by submitting countervailing evidence that the prevailing wage determination is in error and that its wage offer equals or exceeds the prevailing rate of pay in the area of intended employment. (Id.). The CO explained that countervailing evidence must include an independent wage survey of employers in the area of intended employment and a statement addressing why the local office’s prevailing wage determination was in error. (Id.).

Employer submitted its rebuttal on May 19, 1999. (AF 32-37). Employer asserted that this position was an entry level position and that its wage offer was within the allowable margin of error limits of the prevailing wage for this position. Employer relied on the HRA-NCA survey for the Network Analyst I position and argued that this survey is highly reliable and applicable to this position. Employer noted that in the NOF, the CO did not make any reference to Employer’s request that this survey data be used but that the OES Level 1 wage for the position is \$35,942.40 which is slightly less than Employer’s wage offer of \$36,000. Employer argued that this position is “truly ‘entry’ level” and that the worker requires direct supervision and uses only a basic level of understanding as gained through an undergraduate college curriculum. (AF 33). Employer pointed out the fact that it required no experience for the position, that the individual would not perform any “self-directed” work, the individual would supervise no other workers, and the individual would be supervised by administrative and programming staff. (Id.). Employer argued that:

Since this position is open and available to any qualified U.S. workers who might be or become available, the information provided is current and accurate. In other words, an available U.S. worker who today presents himself to us for employment would be asked to perform exactly those duties that we have described in our application, and would need to possess no less than those qualifications that we have described as the actual minimum requirements for the position. The fact that Mr. PHANG has been employed since August

of 1997 does not have any bearing on these elements. The job position and its duties have not changed, and the requirements for the position have also not changed because they are directly related to the job duties and the knowledge needed to perform them. Whereas many workers might choose to undergo additional training, or use their job experience to move into progressively more responsible positions, Mr. PHANG has not done so and is in fact performing the same job duties now that he was originally hired for in 1997.

(Id).

On July 21, 1999, the CO issued a Final Determination (“FD”) denying certification. (AF 30-31). The CO found that the Employer had failed to either amend its wage offer to meet the prevailing wage rate or to produce evidence showing that the prevailing wage determination was in error and remained in violation of Sections 656.20(c)(2), 656.20(g) and 656.21(g)(4). The CO noted that in its Rebuttal, Employer asserted that the only reason provided in the NOF that the position was not entry level is the reference to the Alien’s performance in the job since 1997. The CO found, however, that the NOF also made reference to the description of the job duties as “**originally submitted**.” (AF 31) (emphasis in original). The CO found that the words “working under the direct supervision of admin. and programming staff” were added after the application was filed and the Level 2 prevailing wage was assigned by the State Agency. (Id.). The CO concluded that these “embellishments appeared to have been added for the sole purpose of downgrading the position to an entry level job.” (Id.).

On August 24, 1999, the Employer filed a Request for Review of the denial of certification. (AF 1-29). Employer argued that the offered position was improperly classified at the OES Level 2 wage level for prevailing wage determination purposes, and should have instead been accorded an OES Level 1 or comparable wage. Employer also argued that the CO erred procedurally in that he failed to acknowledge or refer to in any way Employer’s wage surveys from a source that is routinely accepted and cited within this region. In addition, Employer argued that the CO raised for the first time in the FD that the position description considered by the CO was that “as originally submitted” as opposed to the slightly amended version that was transmitted to the CO by the State of Maryland. Employer argued that the NOF “did not specifically raise or discuss this issue, but merely inferred it without the benefit of the bold faced typeface that appeared in the Final Determination.” (AF 8).

Discussion

Under section 656.20(c)(2), an employer is required to offer a wage that either equals or exceeds the prevailing wage determined under 656.40. That regulation states that the prevailing wage for occupations not subject to the Davis-Bacon Act, as in the instant case, must be determined by the average wage paid to workers similarly employed in the area of intended employment. Where an employer is notified that its wage offer is below the prevailing wage, but fails either to raise the wage to the prevailing wage or to justify the lower wage, certification is properly denied. *Kenyon & Kenyon*, 1996-INA-027 (Dec. 8, 1997); *Editions Ereboundi*, 1990-INA-283 (Dec. 20, 1991). When challenging the CO’s prevailing wage determination, an employer bears the burden of establishing both that the CO’s

determination is in error, and that the employer's wage offer is at or above the prevailing wage. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989) (*en banc*).

In the present case, the CO's prevailing wage for the position is \$69,284.80 per year based on the OES Level 2. The Employer's wage offer of \$36,000 per year was below the CO's determination of prevailing wage but was, however, within 5% of the HRA-NCA wage determination for the Network Analyst I position and, according to Employer, it exceeded the OES Level 1 prevailing wage of \$35,942.20.¹ Employer argues that the CO's prevailing wage determination is in error as it has incorrectly classified the job offered as a Level 2 position rather than a Level 1 or entry level position. The CO found that the position was not entry level based on the job duties described on the application for labor certification initially submitted to the local office and based on the fact that the Alien has been performing the job duties since 1997. (AF 39).

The application as originally submitted described the job duties as: "Maintains and improves data communications network systems using computer programming skills and knowledge of network design, software and administration." (AF 45). The Employer later amended the job duties to include "working under the direct supervision of admin. and programming staff." (AF 50). The CO argued that this amendment was made in light of the state agency's classification of the position as Network Analyst II rather than Network Analyst I. Regardless of the Employer's motivation for the amended job description, the Employer never required any experience in the job offered but only a Bachelors of Science. On its face, this job opportunity appears to be entry level. One issue, therefore, is whether the job opportunity should be classified as a Level 2 position based on the fact that the Alien had one year experience in the job offered at the time Employer filed the application for alien labor certification.

One fundamental provision in labor certification requires the employer to describe the job opportunity in terms of its actual minimum requirements. See § 656.21(b)(6). Another provision, § 656.21(g)(6) requires the advertisement to state the minimum job requirements. The overriding objective of these two provisions is to ensure that U.S. applicants are not required to possess a greater degree of training or experience than the alien when he or she was hired. A settled corollary to this principle is that the job requirements cannot include or require the same type of experience which the alien has acquired while working for the employer in the same job. See *Apartment Management Co.*, 1988-INA-215 (Feb. 2, 1989); *Delitzer Corp. of Newton*, 1998-INA-482 (May 9, 1990) (*en banc*).

The CO's finding that this position is not entry level based on the Alien's experience in the job offered appears inconsistent with these requirements. If the Employer is required by § 656.21(b)(6) and § 656.21(g)(6) to describe the position, and to advertise it, in terms of its minimum requirements, and if the

¹The OES wage survey was not submitted by the CO or the Employer for review. The only wage surveys submitted were that of the HRA-NCA surveys for Network Analyst I and II. (AF 34-35).

Employer is also required to describe the requirements as they existed when the Alien was first hired, disallowing any training or experience acquired while on the job, it seems incongruous to also require the Employer to offer a wage that corresponds to the Alien's added on-the-job experience and training. *Cf., University of North Carolina*, 1990-INA-422 (June 9, 1992) (certification granted where wage offer was below actual salary paid to Alien which accounted for Alien's experience gained over and beyond the stated minimum job requirements). In effect, the CO's interpretation of the prevailing wage for a non entry-level position requires the Employer to advertise the wage for a more experienced applicant, to U.S. workers who are not required to have that experience and training. It was, therefore, inappropriate for the CO to base the wage determination on the Alien's prior experience in the job offered as this experience was not required of U.S. workers.

Pursuant to §§ 656.25(c), if a CO does not grant certification, the CO must issue a NOF stating the specific grounds for its issuance. The Board has held that the NOF must give notice which is adequate to provide the Employer the opportunity to rebut or cure the alleged defects. *See Henry Khor*, 1999-INA-153 (Aug. 9, 1999); *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988) (*en banc*). The NOF must specify what the employer must show to rebut or cure the CO's findings; otherwise, the Employer is deprived of full opportunity to rebut. *See Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989).

Here, the CO clearly outlined the necessary corrective actions Employer would need to demonstrate to rebut the NOF. The CO explained that the prevailing rate of pay was determined by the OES Level 2 which was assigned to this job opportunity based on the job duties described in Item 13, ETA Form 750A as initially submitted to the local office and the information contained in Item 15(a), ETA Form 750B. The CO pointed out the fact that the Alien had been performing the job duties since 1997 and cannot be considered an entry level employee. The CO did not provide a job description for OES Level 2 and did not make any reference to the Employer's previously submitted wage survey. In the FD, the CO again made no reference to the wage survey submitted by Employer but concluded that the position was not entry-level. The CO for the first time addressed his finding that Employer amended its application "for the sole purpose of downgrading the position to an entry level job." (AF 31). Although the NOF did state that the wage determination was based on the job duties described in the application as "initially submitted", the CO did not expressly specify that it did not find the amended job description to be credible. These amendments were made to Employer's application before it was submitted to the CO and therefore, it was reasonable that the Employer did not understand that the motivation behind Employer's amendments were being questioned.

In the instant case, a second NOF would have been appropriate to provide Employer an opportunity to respond to the CO's finding that Employer's "embellishments" to the description of job duties were added for the sole purpose of downgrading the position to an entry level job. In addition, the CO should have responded to Employer's wage survey and provided the description of the OES Level 2 job duties in order to allow the Employer to review and respond to the survey used by the CO. It is appropriate, therefore, in light of the deficiencies in the determination reached by the CO, to remand this

matter for further consideration by the CO. At that time, the CO should address the issue raised by the Employer regarding the difference between an entry-level Network Analyst position and the OES Level 2 position. *See Lisa Renstrom*, 1993-INA-262 (June 28, 1994). The CO should also consider that the advertised wage offer should match the value of the minimum requirements, demanded of the Alien when initially hired, and of U.S. applicants, alike, assuming that the wage offer also meets or exceeds the prevailing wage. *See University of North Carolina, supra*.

Order

The Certifying Officer's denial of labor certification is VACATED and the cases is REMANDED for proceedings consistent with this opinion.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California